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LEGAL ENFORCEMENT OF SOCIAL RIGHTS: ENABLING CONDITIONS AND IMPACT ASSESSMENT

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Abstract

This article commends the concise and useful analysis of courts and the legal enforcement of economic, social and cultural rights given in Christian Courtis's book, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*. Yet, in order to complete the picture, a broader analysis of the enabling conditions for litigation and of the social and political impact of judicial activity in this field is required. There are a number of reasons why attempts to litigate economic, social and cultural rights may not result in judicial enforcement and why, even if enforcement is achieved in formal terms, this may not necessarily protect or fulfil the right in practice. Even when compliance is secured in terms of individuals, this may be insignificant or even detrimental to the realisation of the right from a societal perspective. While not dismissing a constructive role for courts in the enforcement of economic, social and cultural rights, it is crucial to investigate carefully who benefits from court enforcement and under what circumstances judicial enforcement is likely to advance the broader realisation of the rights and benefit those whose rights are most at risk. Assessing empirically the impact of social rights litigation is challenging and has rarely been done in a systematic fashion, but this article suggests ways in which this can be pursued.

1 Introduction

Research on legal enforcement of economic, social and cultural rights (hereinafter, 'social rights') has recently turned from a narrow legal focus on judgments – with court victory as the criterion of success – to a broader approach that also considers the implementation of the judgments and the relationships between advances of social rights through litigation and other forms of social mobilisation. While there is an established body of literature examining the (lack of) implementation and social effects of strategic litigation generally,[1] particularly in the North American context, and important works discussing on a more theoretical basis the challenges of implementing court-enforced social and economic rights,[2] more empirically-based work investigating the effects of social rights litigation has been rare.[3] *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*,[4] by Christian Courtis, combines the important work of presenting rich comparative material of economic, social and cultural rights cases with a broader perspective on the circumstances under which such litigation is likely to be successful, also in the sense of being implemented.

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1 See, for example, M. Galatner, 'Why Haves Come Out Ahead: Speculations on the Limits of Social Change' (1974) *Law and Society Review*; G.N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Bakan and D. Schneiderman (eds.), *Social Justice and the Constitution: Perspectives on the Social Union for Canada* (1992) 59-83; D.A, Bell. *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (2004).

2 See, for example, C. Scott and P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1-148 (a seminal article on social rights in the (then future) South African Constitution); and S. Holmes and C.R. Sunstein, *The Cost of Rights* (1999).

3 For efforts made by activists to document effects of social rights litigation, see the International Network for Economic, Social and Cultural Rights (ESCR-Net) at: <http://www.escr-net.org>.

4 C. Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (2008) (hereinafter, *Courts and Legal Enforcement*).

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Other commendable examples attempting to do the same include *Social Rights Jurisprudence* a recent work edited by Malcolm Langford;[5] *Courting Social Justice*, a comparative study of litigation concerning health and education in five countries edited by Varun Gauri and Daniel Brinks;[6] and *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* edited by Roberto Gargarella, Pilar Domingo and Theunis Roux.[7]

All these works have strengths and weaknesses. Among the great strengths of *Courts and Legal Enforcement* is its lightness in form compared to the high density of its insights. It is a tiny volume, running to 105 pages of text, yet it conveys an amazing wealth of information and knowledge and does so in a highly readable way, bearing the mark of having being penned by a single author with a broad and deep knowledge of the field and a gift for communicating it. The discussions of the case material, litigation strategies, jurisprudential developments and complex theoretical debates on the proper role of courts are accessible and useful to practitioners ranging from activists to lawyers and judges, as well as to students and academics – also from outside the legal field. My comments are offered as a member of the latter category; a political scientist with an interest in the role of courts in the global south and the potential of legal mobilisation for social justice.

After reading the book, I have few quarrels with what it says – my argument is with what is not there. It may be an unfair complaint against a text that succeeds in condensing such an array of information, but from a political scientist's perspective some vital aspects are missing or are too lightly touched on. This concerns the social and political context in which the legal enforcement of social rights is sought and judgments are implemented. Too little is said about what it takes in different contexts for individuals and groups to use the courts to have their economic, social and cultural rights enforced. Even less attempt is made to critically assess the broader impact of the legal enforcement of social rights on policy processes and structural change. These are tall orders, but in the following I will spell out these concerns in more detail and point to some possibilities. The first part of the article is concerned with the question what it takes to get enforcement of social rights. It looks closer at the South African social rights cases that often are held up as success stories – in particular *Grootboom* and *Treatment Action Campaign* – and takes a closer look at the special conditions that enabled these litigation efforts to succeed in the South African Constitutional Court. The second part of the article explores the question how we can assess the broader impact of social rights litigation: the number of people directly affected by the judgments, the magnitude of their gain and the broader policy impact. Furthermore, we suggest ways in which we can empirically approach the difficult, but important question of social right litigation enhances social justice or, in this case, justice in health.

2 What Does it Take to Get Enforcement of Social Rights?

In my reading, *Courts and Legal Enforcement* is first and foremost aimed at practitioners, including activists working towards social transformation.[8] It provides them with a valuable toolbox of comparative material – demonstrating the range of avenues that have been used to engage courts in the enforcement of social rights, describing landmark cases and distinguishing different legal approaches taken by courts both in terms of the legal basis and remedies. This is likely to strengthen litigation as an option within activists' *opportunity structure*, by raising awareness of the opportunities this route

[5] M. Langford, *Social Rights Jurisprudence* (2009).

[6] V. Gauri and D.M. Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008).

[7] R. Gargarella, T. Roux and P. Domingo (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006).

[8] Social transformation is understood here as 'the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class'. S. Gloppen, 'Courts and Social Transformation: An Analytical Framework', in Gargarella et al., above n. 8, 35 at 37.

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presents and by enhancing their capacity to effectively utilise it.[9] There is, however, a potential danger of overselling litigation as a route to realising social rights, both as a strategy for specific groups to pursue their rights and more broadly for advancing social transformation. This is due in part to the lack of a thorough discussion of what it has taken to get the different types of social rights cases successfully through the courts and the limited analysis of the social impact of the litigation.

Without a proper contextual analysis of the litigation process, it is difficult to know what lessons can be drawn from specific landmark cases. As an example, I will take a closer look at a case that is favourably discussed in Courtis's book, namely the celebrated *Action Treatment Campaign* case from the South African Constitutional Court.[10] It is indicative of the position of the South African experience that three of the five cases specifically named in the table of contents are South African, the two others being *Soobramoney*[11] and *Grootboom*,[12] which are also discussed below.

2.1. The South African Success Stories Revisited – Models or Exceptions?

Given the extraordinary attention given to the social rights judgments of the South African Constitutional Court – not only in this book but generally in the literature – it is particularly important to consider the processes through which these judgments came about and to analyse to what extent they can be replicated or whether they were dependent on a very specific set of circumstances. I will argue the latter, namely that their (relative) success – especially as regards the *TAC* case – was born out of an unusual and unlikely combination of social and political conditions, a context that differs in relevant respects from the opportunity situation that faces most potential litigants of social rights, particularly in the global south. The *TAC* case utilised a particularly promising window of opportunity that is not only special from a comparative perspective but may also be closing in South Africa itself. This does not mean that there are no useful lessons to be drawn or that other social conditions cannot allow similar achievements, but it does call for caution.

2.2. The *Treatment Action Campaign* Case

As a background for the discussion, I will briefly summarise the story. The *Treatment Action Campaign* case addressed the HIV/AIDS policy of the South African government. The president at the time, Thabo Mbeki of the African National Congress (ANC), was strongly opposed to the consensus position in the medical establishment – and at odds with the majority of South Africans – on the treatment of the pandemic and refused to roll out a programme of antiretroviral medication. The central aim of the Treatment Action Campaign (TAC) was the generalised provision of antiretrovirals as part of the public health service, but in this case the organisation took the government to court over a very specific aspect of its HIV/AIDS policy, namely the failure to provide available

[9] The opportunity structure of potential litigants is their total set of possible avenues for pursuing their substantive aim. The set is determined by their resources as well as the costs associated with the different (combinations of) strategies, and the choice of strategy depends on where likely benefits or chances of success are perceived to be greatest relative to the costs. For a discussion of what constitutes the potential opportunity structure of social rights litigants, see S. Gloppen, 'Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health' (2009) 10(2) *Health and Human Rights* 21; B. Wilson and J.C. Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics' (2006) 39(3) *Comparative Political Studies* 325; and B.M. Wilson, 'Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia' (2009) 2 *Journal of Politics in Latin America* 59.

[10] *South African Minister of Health* v. *Treatment Action Campaign* [2002] (5) SA 721 (CC), 5 July 2002 (hereinafter, *TAC*).

[11] *Soobramoney* v. *Minister of Health, KwaZulu-Natal* [1998] (1) SA 765 (CC), 27 November 1997 (hereinafter, *Soobramoney*).

[12] *The Government of the Republic of South Africa and Others* v. *Irene Grootboom and Others* [2001] (1) SA46 (CC), 4 October 2000 (hereinafter, *Grootboom*).

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and effective medication for mother-to-child transmission of the virus. The drug Nevirapine had been proved effective for radically reducing infection rates in infants born to HIV-positive mothers. The medical company had offered to provide it for free for five years, and the system for providing it had already been developed and tested in a pilot programme, so this was an unusually clear case where the barrier to access of medication was a lack of will,[13] or rather active resistance from a very powerful president who was clearly out of step with his population over the issue.

The case itself was thus highly unusual from the perspective of social rights litigation, in that the challenge here was mainly political, not legal. The case presented the Court with few of the challenges often faced or feared in social rights cases, such as inflicting huge costs or unduly meddling in politics by dictating social policy, as the Court was simply asked to extend existing policy. However, this does not mean that the case was easily won. Quite the contrary, the political context – which included the political dominance of the ANC, its increasingly centralised nature and the prestige President Mbeki had vested in his HIV/AIDS position – made challenges to the government's policy politically very difficult – including for the Constitutional Court. More generally, the South African Constitutional Court's struggle to give content to social rights in a coherent way that would not jeopardise its own position had resulted in an emerging jurisprudence that made social rights litigation demanding.[14]

Before going on to show how the particular nature of TAC as an organisation and the window of opportunity created for it at a very special time in South African history, I will pause to look at how South African social rights jurisprudence had developed at the turn of the century, when the *TAC* case emerged. At the time, the Constitutional Court had only decided two cases directly on the basis of social rights enshrined in the Constitution: *Soobramoney*, which was decided in 1997, and *Grootboom,* which was decided in 2000.

2.3. The *Soobramoney* Case

The *Soobramoney* judgment, regarding the right to health, came as a great disappointment to the South African human rights community.[15] It indicated that the Constitutional Court would take a cautious approach to the individual enforcement of social rights and would be careful not to risk being seen to meddle unduly in budgetary issues. While it would be willing to rule on whether resources were rationally and reasonably allocated within a given budget, it would not make decisions regarding the constitutionality of overall budgetary decisions (such as the size of the health budget).

2.4. The *Grootboom* Case

The *Grootboom* case, while in some ways reviving faith in the Constitutional Court as an avenue for advancing social rights, also confirmed that the Court would not represent a low-threshold opportunity for individual enforcement of social rights. The case concerned the constitutionality of removing an illegal settlement from an area zoned for low-cost housing development. The Court held that the removal as such did not violate the right to housing enshrined in the Constitution – which like the right to health obliges the state to provide progressive realisation subject to resource constraints – as

[13] There were of course still issues of resources involved. Although the medicine would be accessed for free, general roll-out would require a system for administering it, including HIV-testing and counselling.

[14] On the political balancing act performed by the South African Constitutional Court in its first years, see S. Gloppen, *South African Constitutionalism 1994-2000* (PhD thesis on file at the University of Bergen, 2001).

[15] The case was lodged by a patient with renal failure who originally claimed access to dialysis under the constitutional right to emergency health services, provided for in Section 27(3) of the South African Constitution (1996). The Constitutional Court found that the case, being a chronic condition, did not qualify as an emergency. However, it considered – and again dismissed – the claim under the ordinary right to health in Section 27(1) and (2) of the Constitution.

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the purpose of the removal was to implement a housing policy developed to realise the right to housing.[16] The Court explicitly rejected that the right to housing gave rise to a minimum core obligation on the basis of which individuals could claim redress.[17] This, the Court argued, would lead to arbitrariness and queue jumping in a country like South Africa, with millions of people who are homeless or living in extremely poor conditions in the squatter settlements. The Court underlined that the rejection of individual enforcement based on a minimum core approach, did not mean that social rights were not justiciable. Rather, it meant that they should be addressed and enforced at the level of policy. As discussed by Courtis, the Court adopted a 'reasonableness approach' to social rights, entailing that different levels of government are obliged to implement measures that are 'comprehensive, coherent, balanced and flexible', inclusive and attend to urgent and emergency needs of vulnerable sectors of society.[18] Here it found the existing housing policy to be failing and required that this be remedied by developing measures directed at those in most dire need. Furthermore, it required that these measures should clearly lay out the division of responsibilities between authorities at national, provincial and local level and that appropriate resources should be made available to secure implementation. However, the Court set no time frame for implementation, and once again the judgment was directed at the allocation of what was available for the sector rather than overall priorities. The *Grootboom* judgment has been widely hailed in international academic circles as innovative for the way in which it gives content to social rights, responding to much of the theoretical critique that other strategies towards enforcement have encountered.[19] Domestically, the reasonableness approach got a mixed reception, with critics dismissing it as emptying the content of the rights by only leaving the state with an 'administrative law-like, state obligation to act reasonably when devising social policy'.[20] The criticism grew as the practical results of the judgment failed to materialise, and in 2008 Mrs Grootboom, in whose name the case had been brought, died without a house.

In other words, the jurisprudential context in which the *TAC* case emerged was one in which it seemed clear that the Court was reluctant to provide individual remedies in social rights cases, but addressed them by requiring policy change – while at the same time being cautious not to upset the relationship with the political branches by setting time frames, requiring the authorities to report back or ordering remedies seriously and squarely challenging budgetary priorities. This meant that successful social rights

[16] The case was originally argued on the basis of the right to shelter of the children of the community (Section 28(1)(c)), but, unlike the Cape division of the High Court, the Constitutional Court held that, as long as the children where with their families, the parents – not the state – bore the primary obligation and that the claim was more appropriately decided under the general right to housing in Section 26 of the Constitution.

[17] The minimum core approach, adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in General Comment 12, was advocated in the amicus brief from the Legal Resources Centre, on which the Court relied heavily in the judgment. The Court argued that, since South Africa had not ratified the Convention on Economic, Social and Cultural Rights, it was bound by the wording of its own Constitution rather than the interpretation of the Committee. For criticism of the Court's rejection of this route, see D. Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence' (2003) 19 *South African Journal of Human Rights* 1 at 8-10; D. Brand, 'The Proceduralisation of South African Socio-economic Rights Jurisprudence, or "What Are Socio-economic Rights For?"', in H. Botha et al. (eds.), *Rights and Democracy in a Transformative Constitution* (2003) 33; S Liebenberg, 'South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6 *Law, Democracy & Development* 159; and T. Roux, 'Understanding *Grootboom* – A Response to Cass R. Sunstein' (2002) 12(2) *Constitutional Forum* 41.

[18] *Grootboom*, above n. 13, at paras. 39-44, 46.

[19] See, for example, C.R. Sunstein, *Designing Democracy: What Constitutions Do* (2001) at 221-337 (where he approves the *Grootboom* judgment); R. Dworkin, 'Response to Overseas Commentators' (2003) 1 *International Journal of Constitutional Law* 651 at 652-653; and M. Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' (2004) 82 *Texas Law Review* 1895.

[20] M. Pieterse, 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' (2007) 23 *South African Journal of Human Rights* 157 at 164.

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litigation would require substantial research capacity, including in-depth knowledge of existing policies and how these could be transformed to better protect or advance the right.[21] It would also require a strategy for following up on implementation.

2.5. The Exceptional Nature of *TAC*

The Treatment Action Campaign was particularly well equipped to undertake such demanding litigation. It was formed as a broad social movement aimed at securing effective HIV/AIDS treatment for the general population. While AIDS in Europe and the United States disproportionally affects men who have sex with other men, in Africa the pandemic leaves all parts of the population similarly at risk. Still, people from the gay rights movement played a key role in the Treatment Action Campaign. The South African gay rights movement had formed an effective lobby during the constitution-building process in the early 1990s, due largely to its strong legal expertise, which was closely connected to the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand in Johannesburg. The CALS' AIDS Law Project (ALP), which later has become an independent organisation, effectively became the legal arm of TAC, with considerable personnel overlap in addition to the commonality of aims. This gave the movement an extraordinary 'in-house' capacity for legal research and litigation. Around the time of the *TAC* case, the potential for carrying out effective research was particularly good for at least two reasons, both linked to the then very recent transition from apartheid rule. CALS had been an important site of intellectual opposition against apartheid and continued to retain a staff of very able, committed and well-connected legal scholars. With a widespread interest among international donors in supporting the transition from apartheid and the consolidation of democracy, research funding in South Africa was ample in the 1990s and early 2000s. With the international focus on the HIV/AIDS pandemic and the growing realisation of the magnitude of the problem in South Africa, this was also an area where funding was particularly easy to get. It is also important to realise that the *TAC* case on the prevention of mother-to-child transmission was not an isolated effort but part of a line of carefully sequenced efforts to secure access to antiretroviral medication, including efforts to secure generic production of medication directed at international medical companies, in which the TAC and the South African government were on the same side.[22] Long and continuous engagement with the relevant public authorities had provided the TAC with a deep understanding of existing policies – and had left a paper trail demonstrating continuous efforts to exhaust alternative avenues.[23]

In a politically sensitive area like HIV/AIDS policy, the AIDS Law Project, as a mostly foreign-funded unit with a predominance of white and gay lawyers, could be vulnerable and easy to marginalise notwithstanding its professional capacities – but as a social movement the TAC mobilised support far beyond the gay community and the academic elite. The central leadership figures had a background in and maintained links to the ANC, the former liberation movement that was now in government. This meant that even if they were in important respects critical of government policies, the TAC could legitimately claim to be in line with the general ideology of social transformation that formed the basis of the liberation struggle. The combination of a strategically chosen case, in which the unreasonableness of existing policies were stark and had fatal

[21] For a more in-depth discussion, see S. Gloppen, 'Social Rights Litigation as Transformation: South African Perspectives', in P. Jones and K. Stokke (eds.), *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 153.

[22] M. Heywood 'Shaping, Making and Braking the Law in the Campaign for a National HIV/AIDS Treatment Plan', in P. Jones and K. Stokke (eds.), *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2006) 181.

[23] See J. Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education', in Gauri and Brinks, above n. 7, at 38.

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consequences for unborn infants, and an effective social mobilisation campaign meant that the case was basically 'won in the street' before it came to the Constitutional Court, balancing out the political costs for the Court of going against the government.[24]

When implementation of the judgment proved to be sluggish, the TAC followed up, *inter alia*, by threatening the responsible authorities with new court actions.[25] The roll-out of the prevention programme did pick up after the judgment – although not as rapidly as in some other countries in the region. Five years later, in 2007, 57% of HIV-positive mothers were offered the preventive regime.[26]

So what lessons can be drawn for other contexts from the South African cases generally and the *TAC* case in particular? The message that comes through in *Courts and Legal Enforcement* is that social rights can be claimed not only at the individual level but also in terms of structural judgments redirecting policies in a particular area according to standards of rationality and reasonableness. This is true and important, but what also needs to be made clear is that such litigation is exceptionally demanding in terms of legal expertise and research capacity and that to be effective it must be an ongoing effort working through different channels and supported by social mobilisation. This is particularly important where the issue in case is politicised and in order to secure enforcement.[27]

That legal strategies are generally more effective when combined with broad and sustained social mobilisation is nothing new, nor is the importance of accessing legal expertise.[28] However, the special – and in my view decisive – factors in this case, which are difficult to achieve in other contexts, were the extremely close ties between the broader social movement and top-level expertise in the field and the existence of in-house legal scholars with continuous research capacity on this scale who knew the government's policies better than the government did and had the ability to carefully plan and build up jurisprudence. This, in my view, is very difficult to replicate elsewhere – at least in developing countries.

2.6. The Exceptional Nature of the South African Context

While some of this is particular to the *TAC* case, other South African advances in the field of social rights have also depended on the unusually strong legal support organisations working in the area of social rights and the very close connection that exists in South Africa between social rights activists and the country's top advocates, who will take such cases *pro bono* or even provide amicus briefs.[29] This is very particular to the post-

[24] T. Roux, 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court', in S. Gloppen, R. Gargarella and E. Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (2004) 92.

[25] Heywood, above n. 23. This included a contempt of court application against the provincial minister responsible for health in Mpumalanga, one of the provinces where implementation was slow. P. de Vos, 'So much to do, so little done: The right of access to anti-retroviral drugs post-Grootboom' (2003) 7 *Law Democracy and Development*.

[26] 'In South Africa, home to more than 200,000 pregnant women living with HIV in 2007, the coverage of antiretrovirals for preventing mother-to-child transmission increased from 15% in 2004 to 57% in 2007… Coverage increased from 3% to 46% in Mozambique and from 25% to 75% in Kenya during the same time period. Coverage also increased substantially in other countries between 2004 and 2007.' WHO, UNICEF and UNAIDS, *Towards Universal Access: Scaling up HIV Treatment, Care and Prevention Interventions in the Health Sector* (2008) 90. In January 2008, South Africa introduced a new and better regime for mother-to-child transmission of HIV, although stopping short of the 2006 WHO guidelines. See the TAC website: <http://www.tac.org.za/community/node/2119>.

[27] For a more in-depth discussion of conditions for social rights litigation in post-apartheid South Africa, see Gloppen, above n. 22.

[28] See discussion in S. Gloppen, 'Public Interest Litigation, Social Rights, and Social Policy', in A.A. Dani and A. de Haan (eds.), *Inclusive States: Social Policy and Structural Inequalities* (2008).

[29] For example, in the *Grootboom* case, the amicus brief prepared by Geoff Budlender for the Legal Resources Center and his oral advocacy before the Court had a huge influence on the judgment. Budlender tried to convince the Court to include a nuanced approach to core minimum entitlement in their reasoning of its 'reasonableness' ideas, and, while the Court did not accept core minimums per se, it did build in equivalences, which was crucial. A condition that may have enhanced both the quality of the argument

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apartheid context, and in my view this has been decisive for the successes that have emerged from a context where, despite the catalogue of explicitly justiciable social rights in the Constitution, enforcement is difficult to achieve, even in a strict legal sense.

However, the remarkable nature of some of the South African judgments is not only a product of remarkable competence on the part of activist and lawyers and the fact that the high threshold that was established for social rights litigation required them to use their capacities to the full. The composition and nature of the first Constitutional Court was also remarkable, not least in that it included on the bench judges who were deeply committed to social rights. Some of them had been central in having them included in the Constitution in the first place. The bench included not only professional lawyers but also legal academics with a commitment to take account of theoretical debates. At the same time, the Court struggled for authority in relation to the rest of the legal system, which stimulated a cautious approach towards direct application and the enforcement of social and economic rights.[30]

The Court's jurisprudence should also be seen in the light of the Constitution itself with regard to the way social rights were included and made justiciable on an equal basis with other rights. Although examples from India and Costa Rica show that courts can build a strong social rights jurisprudence, for example concerning the right to health, without express recognition of that right, for example by extrapolating it from the right to life, the express recognition of social rights gave the Court a more undisputed legitimacy to decide social right cases.[31] The continuous engagement of experts on social rights in South Africa's academic community – most notably the milieu developing around Sandy Liebenberg at the University of the Western Cape's Community Law Centre – in lobbying, as constitutional experts during the process of writing the Constitution and in engaging with the social rights cases as they entered the courts is another factor that has contributed both to the way social rights were constitutionalised and to the emerging jurisprudence.[32]

The South African context is very different from situations where the threshold is lower and it is easy to take social rights cases to court. Where courts are comfortable with granting enforcement in individual cases of rights protection and enforce them in ways parallel to civil rights cases but are reluctant to go into policy decisions (such as, for example, in Brazil), potential litigants face other demands and incentives than in the South African case, with less to gain from collective and coordinated strategies. Yet a different opportunity situation and incentive structure is presented to litigants in a country like Colombia, where the Constitutional Court will engage both in individual enforcement of social rights and at the policy level, and where the political institutions are generally unresponsive to claims for social justice. The Colombian Constitutional Court, like its South African counterpart, is comprised in part of legal academics and judges with a strong commitment to social rights, but here much less emphasis is placed on what the litigants bring to the table in the form of legal argument. The threshold for enforcing social rights is much lower and the role of litigants less crucial in the sense that the composition of the Court, rather than the nature and competence of the litigants, is decisive for the nature of the enforcement of social rights. This makes for a different

presented to the Court and the Court's own reasoning in the case was the broad engagement by activists and academics, domestically and internationally. External actors were engaged in brainstorming arguments and may have exerted influence through writings published at the time. See, for example, C. Scott and P. Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' (2000) 16(2) *South African Journal of Human Rights* 206, which appeared while the Court was writing the judgment. Budlender and other top advocates such as Wim Trengrove have acted in most landmark social rights cases. See Gloppen, above n. 22.

[30] See Gloppen, above n. 15.

[31] Explicit recognition of a social right in the Constitution may, however, tie courts more closely to the wording of the right and the limitations inherit in it and thus may be less conducive to an expansive interpretation of a right than when a similar right is constructed by a court itself.

[32] There was also interaction with international academics. The article by Scott and Macklem discussed above (n. 3) grew out of a policy paper prepared for the ANC in exile. Another article by C. Scott, 'Social Rights: Towards a Principled, Pragmatic Judicial Role' (1999) 1(4) *Economic and Social Rights Review* 4, was delivered as a conference lecture to an audience that included several judges of the South African Constitutional Court.

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– and perhaps more fundamental – vulnerability, in that enforcement of social (and other) rights is severely affected by changes in the Courts' composition. At the time of writing, there are fears that, due to the new composition of the Court, the nature of its jurisprudence will change dramatically, also in the field of social rights.[33]

My first argument is thus that activists who seek to learn from comparative experiences such as the landmark South African cases presented by Courtis should also look closely at the social and political dynamics that brought them about. There is no smorgasbord of options that litigants can choose from – the opportunity structure of litigants is closely linked to the social context. This is connected to a second argument, to which I now turn, namely that litigation efforts borne out of a concern for social justice (rather than narrow individual or group interests) should be more concerned with the impact of litigation efforts and that the literature (including *Courts and Legal Enforcement*) currently provides scant basis for such assessments.[34]

3 How Can We Assess the Broader Impact of the Legal Enforcement of Social Rights?

Most analyses of social rights litigation end with the judgment and say little about implementation. As noted earlier, *Courts and Legal Enforcement* is among the commendable efforts to go beyond this and also look at the extent to which the judgments are in fact implemented. In a short volume, there is a limit on how much empirical material can be presented, but Courtis's book clearly points out the importance of also taking into account the implementation of judgments and analysing measures that can contribute towards actual enforcement. This is a commendable and necessary approach. Not least from the perspective of people whose social rights are violated and the activists working on their behalf, it is important to avoid motivating efforts that only result in parchment victories. Litigation will usually be one of several options through which they can seek to advance their rights.[35] Knowledge of what it takes to succeed, both in court and in order to have the judgments implemented, is thus crucial information in the calculation whether to spend energy and resources on litigation rather than on other forms of mobilisation.

While laudable, the approach taken to the impact of judgments in *Courts and Legal Enforcement* is still too limited, particularly from the perspective of advancing social rights in society as a whole. Litigation, even when it succeeds and is implemented, may still have very limited or even a negative overall impact on the ground, either because it affects few people, because the measures taken to implement it are ineffective or because it skews resource allocation so that other rights are jeopardised. Litigation that is positive for particular individuals and groups and helps to secure their social rights may at the same time have a detrimental effect on the broader advancement of social rights in society. If groups that are relatively well off use litigation to secure their rights (for example to advanced medical treatment at public expense), this may skew public spending disproportionally towards such treatment to the detriment of problems affecting more vulnerable sections of society whose social rights are most at risk. But how can we assess the broader impact?

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[33] That Colombian Constitutional Court magistrates serve eight-year non-renewable terms adds to its vulnerability to politically motivated changes in composition. On the trajectory of the Colombian Constitutional Court's jurisprudence, composition and political vulnerability, see S. Gloppen, B. Wilson, R. Gargarella, E. Skaar and M. Kinander, *Courts and Power in Latin America and Africa* (2010, forthcoming).

[34] Note, however, the efforts made by activists to document the effects of social rights litigation and make them available. See above n. 4.

[35] As indicated above, their opportunity structure depends on their own resources (including access to legal expertise), as well as on the threshold of access to relevant decision-making bodies (including the courts). If the political society or relevant administrative structures are inaccessible or unresponsive, and there is a low threshold of access to the legal system and reasonable possibilities of success, litigation is more likely to be considered worthwhile. On potential litigants' opportunity structure, see also Gloppen et al., above n. 34, and Gloppen, above n. 10; Wilson and Rodríguez Cordero, above n. 10; and Wilson, above n 10.

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As demonstrated very well by Christian Courtis in *Courts and Legal Enforcement*, the legal enforcement of social rights may take a multitude of forms, ranging from direct orders to provide a good or service to a particular individual whose right has been infringed or to a group that has been unduly excluded from a general scheme (as the South African Constitutional Court did in the *TAC* case) to broad structural judgments declaring a particular state of affairs unconstitutional, as the Colombian Constitutional Court did with regard to displaced people,[36] or ordering the restructuring of a policy area, as the Colombian Constitutional Court did in July 2008 with regard to the health system[37] and the South African Constitutional Court did in the *Grootboom* judgment.

Assessing the various impacts of a judgment is fraught with difficulty and uncertainty: How many people are affected? How can we measure effect, and, if we can, how much of the effect that we see on the ground is due to the judgment or to other factors? Are policy developments that seem to result from the judgment part of a general trend that would have come about anyhow? And how should indirect effects, such as the influence on later jurisprudence in a field, be taken into account? Additional challenges arise if we want to investigate who benefits (and who, if anyone, loses out) because of the judgment or if we try to compare the impact of cases in a more systematic and quantifiable manner. Despite the problems of standardisation, uncertain causal relations and confounding factors, some attempts to go beyond case studies and assess more systematically the impact of the courts' enforcement of social rights have recently emerged.

3.1. Efforts to Measure Impact of Social Rights Enforcement

In their ambitious volume on court enforcement of the right to health and the right to education in five countries (Brazil, India, Indonesia, Nigeria and South Africa), Varun Gauri and Daniel Brinks attempt to systematically compare the relative importance of social right litigation in these countries. The countries differ in terms of size and level of economic development and have very different legal systems and patters of litigation and judicial enforcement.[38] To find a comparable measure of the impact of litigation, Gauri and Brinks take as their point of departure: (a) the number of cases in each country where the courts have enforced these rights (controlled for population size); and (b) an estimate of the degree to which these have been implemented. However, since judgments in common law countries normally have an *erga omnes* and precedent-setting effect and social rights cases often are test cases aimed at changing of policy, it makes little sense to compare their impact directly with the impact of court enforcement of social rights cases in civil law countries, where the courts have traditionally treated each claim separately and judgments tend to focus more narrowly on individual remedies. Gauri and Brinks have tried to account for this by adding a standard multiplier for cases aimed at achieving policy change.[39] This is, as they themselves acknowledge, a crude measure. Given reliable data, it would be possible to differentiate the multiplier to give a more accurate picture of the number of people affected in the different cases. It would also be useful to develop a measure that could differentiate between impacts in terms of the profoundness of effects (provision of life saving drugs such as anti-retroviral drugs for AIDS patients v. quality of life enhancing Viagra treatment), that could take into account the cost-effectiveness of the intervention and that could tell us something about who benefits from the legal enforcement (for example in terms of the social gradient).

[36] Corte Constitucional de Colombia, *Sentencia T-025/04* (2004). See presentation of the case in *Courts and Legal Enforcement*, above n. 5, at 53.

[37] Corte Constitucional de Colombia, *Sentencia T-760/08* (2008). See presentation of the case in A.E. Yamin and O. Parra-Vera, 'How do courts set health policy? The case of the Colombian Constitutional Court' (2009) 6 *PLoS Medicine* 2, available at: <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.1000032>.

[38] Gauri and Brinks, above n. 7.

[39] The multiplier used here is 100, which they (rightly) see as a conservative measure. This is a simplified sketch of their methodology. For a more detailed account see the concluding chapter in Gauri and Brinks, above n. 7.

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Courting Social Justice does not give all the answers, but Gauri and Brinks' methodology provides a useful starting point. The most important contribution is perhaps in the way it draws attention to the importance of the systemic enforcement of social rights. Enforcement resulting in policy change – if implemented – can easily outweigh the impact of thousands of individual cases.[40] Indeed, a judgment like that of the Indian Supreme Court in the famous Delhi vehicle pollution case, where the Court demanded a shift towards cleaner fuel in Delhi's public transport system, affects millions of people and advances their right to live in an environment that is not detrimental to their health.[41] This one case can in itself outweigh the impact of thousands of cases where individual rights are enforced, but where the courts are reluctant to pronounce on policy issues, such as in Brazil.[42]

However, are there ways to come to grips with the challenges in assessing the impact of social rights litigation that *Courting Social Justice* is not as successful in tackling? Are there methods that can take into account the seriousness of the rights violation, the magnitude of the impact, the cost-effectiveness of the remedy ordered by the court and whether the overall effect contributes towards social justice or rather deepens inequalities in society with regard to social rights?

In the remainder of the article I will exemplify how we can approach these issues. To do so I will use examples from an ongoing project seeking to analyse the broader impact of health rights litigation in different countries.[43] While the discussion here focuses on the right to health in particular, similar approaches could be developed to analyse the impact of enforcing other social rights.

3.2. Scale

First of all, this project suggests a different approach to assess the impact of court-enforced social rights with regard to the number of people affected. While, like Gauri and Brinks, it draws on court registers and statistics for an estimate of the number of cases, it seeks to move beyond a standard multiplier in order to estimate the number of external beneficiaries (i.e. people affected other than the original litigants). Where a treatment or vaccine is introduced by a court order (or otherwise comes about through a court-induced policy process), it may be possible to estimate the scale of beneficiaries from the number of treatments/doses distributed. Alternatively, if such statistics are not available or reliable, the approximate number of beneficiaries can be calculated indirectly by using estimates on disease prevalence combined with data on the utilisation of the service. When more wide-reaching health reforms are set in motion by court orders (such as the 2008 judgment of the Colombian Constitutional Court), health facility surveys and household surveys can be used to measure changes in access

[40] Gauri and Brinks, above n. 7.

[41] S.C. Writ. Pret. (Civil), *M.C. Metha* v. *Union of India* (1985) (No. 13029). 'Court order in the Supreme Court of India. Writ Petition (Civil) No. 13029 of 1985, *M.C. Metha* versus *Union of Indian and Others*' is available at: <http://www.cseindia.org/campaign/apc/cng/cng_cngorder_ ordertext.htm>. See also T. Staer, 'Can the Judiciary Manage the Environment? A Case Study of Judicial Activism in India' (MA thesis on file at the University of Oslo, 2006).

[42] Gauri and Brinks, above n. 7.

[43] The project 'The Right to Health through Litigation?', funded by the Norwegian Research Council, is a collaborative project between the Chr. Michelsen Institute (CMI), the Faculty of Medicine at the University of Bergen, Harvard Law School, the Centre for Applied Legal Studies in South Africa and researchers from the countries included in the study, which are Argentina, Bangladesh, Brazil, Colombia, Costa Rica, India and South Africa. An overview of the theoretical framework of the project is provided in Gloppen, above n. 7. The following outline is based on yet unpublished documents from this project, in particular O. Mæstad and L. Rakner, 'Assessing the Impacts of Health Rights Litigation. Methodological Issues' (2008); O. Mæstad and L. Rakner, 'Impacts of Health Litigation – A Research Template' (2009); and O.F. Norheim and B. Wilson, 'Health Rights Litigation and Access to Medicines in Costa Rica: Priority Classification of Successful Cases from the Constitutional Court' (2009). O.L.M. Ferraz and D. Wang, 'Right to Health through Litigation Project: Brazil Case Study' (2009). (All papers on file with the CMI/Gloppen.)

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to health services resulting from court enforcement. These strategies can give a better picture of the reach of court enforcement of social rights in terms of people affected, but they do not tell us who is affected or how much they gain (or lose).[44]

3.3. Magnitude of Gain

To assess the magnitude of the gain for the beneficiaries, the suggestion is to use the estimated health benefits that are found in the literature, where available (these are commonly published, for example, in relation to the introduction of new treatments). If this is not possible, the magnitude of the gain can be estimated in terms of the reduction in costs for patients as a result of the court decisions, provided that estimates of the costs of obtaining the service before and after the decision can be found. Such analyses, done on a comparative scale, would improve our basis for evaluating the relative value of various forms of court enforcement of social rights.

3.4. Policy Impact – Causation Problems and Process Indicators

Most court cases on the right to health arise out a particular medical concern of an individual or group, in which case the effect beyond the litigants themselves is of less concern to the decision to go to court. However, some court action originate with activists whose aims are collective and who seek to advance social justice. From this perspective, court enforcement aimed at policy change – where feasible – is more efficient. The problem, from an analytical perspective, is that it is normally difficult to establish a clear causation between litigation and policy change. To document that specific changes in health policy are in fact caused or decisively influenced by court enforcement is fraught with uncertainty. It is probably not possible to eliminate all uncertainty, but comparative qualitative studies can document changes that have taken place in areas that have been subject to court enforcement (e.g. the range of services provided, essential drugs lists and insurance coverage). Furthermore, analysis of policy documents, documentation of media coverage, public hearings and legislative debates, as well as interviews with participants in the process (policy-makers, judges, activists and policy analysts), can serve to substantiate the assumption that the policy changes do in fact stem (at least in part) from the court orders.[45]

Social rights are also about being heard and being able to participate in priority setting and in shaping institutions and policies. It is thus also interesting to assess the impact of litigation and court enforcement of social rights on the policy process itself. Does it make the process more inclusive, participatory and accountable? If so, which new actors and sections of society are included? Qualitative studies can document process changes resulting from litigation, such as changes in the degree of public deliberation on relevant policies and priorities and the introduction of new (or the strengthening of existing) mechanisms to ensure that decision-makers take into account the outcome of the participatory process.

3.5. Costs

In order to understand how court enforcement affects health policies in practice, one possible starting point is to document the budgetary impact of the litigation. What are the government's costs related to the provision of services ordered by the court or stemming from policies introduced as a result of court-enforced health rights? This is relatively straightforward to estimate if there is a separate budget line for the added service. Unfortunately, this is often not the case. A possibility then is to rely on indirect estimates of costs per treatment (for example based on market prices of drugs or cost estimates for

[44] Mæstad and Rakner (2009), above n. 44.
[45] Mæstad and Rakner (2009), above n. 44.

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treatments drawn from cost-effectiveness studies). By combining these with estimates of the number of beneficiaries, we will have a reasonably sound indication of the impact of the litigation in terms of costs.

Since public budgets are usually not infinite, increased costs in one area normally have to be compensated for in another area (although not necessarily, or fully, as increased costs may lead to efficiency gains or fresh resources). Changes in costs and relative budget allocations can tell us something about how court-enforced rights change priorities between policy areas. In addition, assessing changes over time in the overall budget relative to the share that is used for litigation induced expenses indicates whether or not other areas are losing out. However, this is still a crude measure and cannot in itself tell us whether the changes in allocation are for the better or the worse from the perspective of social justice.

3.6. More Justice in Health?

Assessing whether judicial enforcement of health rights leads to more or less fairness in the distribution of health benefits is challenging and, from the perspective of social justice, particularly interesting. I will therefore explain in some detail how this is approached, by outlining the methodology used by Norheim and Wilson in a sub-study of the impact of court cases regarding access to medicines in Costa Rica.[46] They examine the forms of treatment that are the subject of successful litigation and use available medical evidence regarding the burden of disease and the effectiveness of treatment to assess the distributional consequences of the decisions. Many of the early cases, in Costa Rica as elsewhere, concerned people living with HIV/AIDS: some concerned essential medicines, while others regarded high-cost treatment for cancer, multiple sclerosis and kidney failure. 'Whether successful litigation and a higher priority to these treatments make the health system more just, depends on what the prior situation was for the patient groups relative to others: do other patients have unmet needs for which they could have been helped more?'[47] Despite the increasing frequency of health rights cases in Costa Rica, particularly since 1997,[48] little is know about their impact on the health system and whether they led to a more equitable and cost-effective allocation of healthcare resources.[49]

The question addressed here is whether the Court secured individuals access to high priority medicines that the publicly funded healthcare system in Costa Rica should have provided or whether it secured such access in cases that from a public health or social justice perspective would be seen as a low priority.

Norheim and Wilson selected a set of successful cases, extracted a brief case description of each to clarify the medical condition and medication involved and then searched for published studies evaluating the medicines according to the methods of cost-effectiveness analysis and health technology assessment (HTA). This meant extracting relevant medical evidence concerning health outcomes and costs that enabled an evaluation of the effectiveness of each medication, its costs and the severity of condition for a typical patient.[50]

A central assumption is that health systems should aim for two goals: efficiency and fairness in the distribution of health and healthcare. 'Although people disagree about how much weight the different concerns should have, there are some criteria that almost all theories of resource allocation in health care would recognize … that the priority of a

[46] Norheim and Wilson, above n. 44.

[47] Norheim and Wilson, above n. 44 at 1.

[48] The important role of the Costa Rican Constitutional Chamber in enforcing the right to health is also noted by Courtis in *Courts and Legal Enforcement*, above n. 5, at 52.

[49] In the words of Albin Chavez, CCSS Pharmacology Director: 'The objective [of the CCSS medicine selection] must be to assure to all the sectors of the population the accessibility and rational use of medicines that respond to the main health requirements.' (Presentation, San Jose, June 2008, on file with the CMI/Wilson).

[50] Norheim and Wilson, above n. 44, at 5. Information was also collected concerning the quality of this evidence itself.

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given condition and its intervention should be assessed in terms of.'[51] These criteria are: the severity of disease, if untreated; the medical effectiveness and cost-effectiveness of the intervention; and the quality of the evidence on which the assessment is made.

On this basis, each medicine is evaluated according to predefined criteria and classified into one of four priority groups:[52] high priority (I); medium priority (II); low priority (III); and experimental interventions (IV). An intervention is assigned high priority 'if the condition is severe if untreated (poor prognosis in terms of lost life years or loss of quality of life), if the intervention is highly effective (improved prognosis in terms of life years or quality of life); and if the intervention is reasonably cost-effective. In addition, effectiveness and cost-effectiveness must be documented in high-quality studies (preferably randomized controlled trials).'[53]

When Norheim and Wilson evaluated the most common types of medicines enforced by the Court according to these criteria, they found that most of them provided a gain of less than 0.5 quality-adjusted life years (QALYs), which places them in priority group III (low priority).[54] For comparison, the gain from antiretroviral therapies for HIV/AIDS (which were introduced in Costa Rica as a result of earlier court cases) was estimated to be more than 3.5 QALYs, which places them in priority group I (high priority). Most of the conditions for which the right to treatment is enforced by the Court are quite severe, however. Most imply a QALY loss of five years or more, and almost all the medications have been proven to be effective in large randomised clinical trials. In terms of cost-effectiveness, only one intervention is evaluated as highly cost-effective, while more than half are evaluated as not cost-effective. In the combined assessment, none of the medications are classified as high priority (group I) and only one as medium priority (group II). In other words, with few exceptions, the medications that the Costa Rican Constitutional Chamber ordered the public health system to provide in 2008 offer relatively marginal health benefits for very severe conditions at a high cost to the healthcare system.[55] None are nearly as effective or address such a severe condition as antiretroviral therapy for HIV/AIDS.

What can this study – and the methodology developed here – tell us about whether court-enforced health rights lead to more or less fairness in access to medicines and the distribution of health benefits? In the case of Costa Rica, this preliminary analysis indicates that court enforcement does not contribute significantly to more justice in access to medicines. However, it also clearly shows that medical cases vary greatly in this regard and, for example, that anti-retroviral drugs, which have been enforced by courts in several countries to improve justice in the health system, have in most cases made the health system more just (including in South Africa, where Nevirapine was granted by the judgment in the *TAC* case). That said, it is important to remember that this classification in priority groups is only one part of the larger picture, even from the perspective of medical cases.

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[51] Norheim and Wilson, above n. 44, at 5. See C. Ham, 'Synthesis: what can we learn from international experience?' (1995) 51 *British Medical Bulletin* 4 819; C. Ham and L. Locock, *International Approaches to Priority Setting in Health Care: An Annotated Listing of Official and Semi-Official Publications, with a Selection of Key Academic References* (Birmingham 1998); A. Coulter and C. Ham (eds.), *The Global Challenge of Health Care Rationing* (2000); O.F. Norheim, 'Limiting Access to Health Care: A Contractualist Approach to Fair Rationing' (Ph.D. dissertation on file with the University of Oslo, 1996); O.F. Norheim, 'Increasing Demand for Accountability: Is There a Professional Response?', in A. Coulter and C. Ham (eds.), *The Global Challenge of Health Care Rationing* (2000).

[52] This is done according to a standard public health or priority setting perspective. See, for example, A. Williams, 'Ethics and Efficiency in the Provision of Health Care', in M. Bell and S. Mendus (eds.), *Philosophy and Medical Welfare* (1988) 111; A Williams, 'QALYs and Ethics: A Health Economist's Perspective' (1996) 43(12) *Social Science and Medicine* 1795; C.J. Murray and A.D. Lopez, 'Evidence-Based Health Policy – Lessons from the Global Burden of Disease Study' (1996) 274(5288) *Science* 740; E. Nord, *Cost-Value Analysis in Health Care* (1999); N. Daniels, 'Principles for National Health Care Reform' (1994) 24 *Hastings Center Report* 8; N Daniels and J. Sabin, *Setting Limits Fairly: Can We Learn to Share Scarce Medical Resources?* (2002) 1.

[53] Norheim and Wilson, above n. 44, at 6. A more detailed basis for the classification is given in the paper.

[54] The exception is Trastuzumab for breast cancer, where the gain in terms of quality-adjusted life years is higher. Norheim and Wilson, above n. 44, at 9.

[55] Norheim and Wilson, above n. 44, at 10.

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It still does not tell us *who* loses out or gains or whether or not the courts' enforcement of the right expands the overall right to health in society. From the perspective of social justice, it makes a big difference whether beneficiaries include poor and marginalised groups whose rights are most at risk. With respect to the enforcement of individual claims, which are particularly common in Latin American countries, it is possible, at least in principle, to collect data on the socio-economic characteristics of litigants and compare them with the characteristics of the general population. In theory, this can be done directly by collecting income data on each litigant and comparing them with national income statistics. If such data are non-existent or inaccessible, data on average income in litigants' residential areas can serve as a meaningful proxy, but only in societies where statistical differences reflect clear social segregation on the ground. Attempts to do the latter for Brazil indicate that court enforcement of the right to health at the individual level tends to benefit the better off, who get access to expensive treatment that would not otherwise be provided.[56] However, the threshold for litigation is higher in Brazil than, for example, in Colombia and Costa Rica, the two other Latin American countries with the highest number of health rights cases. It is not clear how this affects the social gradient among the petitioners who seek enforcement from the courts, but there is reason to believe that differences in information and resources may still play a certain role.

But what about the social gradient of court-enforced policy change? As noted earlier, changes in policy may happen either in response to a direct court order (as in the *TAC* case) or a structural judgment (such as the *Grootboom* decision or the Colombian Constitutional Court's *Sentencia T-760/08*, in which it ordered a restructuring of the health system) or because (repeated) individual claims enforced by the courts initiate policy changes (as in the case of HIV/AIDS treatment in Costa Rica and Brazil). In both types of cases, the indications (based on still quite scant material) are that the distribution of beneficiaries is less socially skewed. In particular, cases where courts pronounce directly on policy matters are more likely to (also) benefit poor and marginalised sections of society.[57] From this perspective, it is important to look further into the political dynamics around court enforcement of social rights aimed directly at changing policy in order to better understand why some courts (e.g. in Brazil) have a high barrier against such involvement, while others (e.g. in South Africa) are more comfortable with this than individual enforcement.

4 Concluding remarks

Christian Courtis and the International Commission of Jurists have done an impressive job in *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, providing practitioners as well as scholars with an insightful yet easily accessible volume. In addition, they provide activists aiming to use the courts to advance social justice with a very useful toolbox of cases and approaches. However, this article has argued that the book and the literature in general place too little emphasis on the social and political dynamics that conditioned the social rights cases that they cite as examples. They thus stand out too much as a range of strategies from which activists can freely choose and may thus oversell litigation as an option. Added to this is the limited focus on the impact of litigation. Even among the studies that have now started to take implementation into account, the broader effects of litigation in terms of fairness and social justice are not normally addressed. Preliminary attempts to address this within the field of health indicate that the social impact of litigation varies radically depending on the social conditions and the approach taken by the courts. Where courts mainly enforce individual claims, the indications are that court enforcement tends to skew healthcare allocations towards the better off and towards conditions that should have less priority from a fairness perspective. In contrast, the direct involvement of courts in the formation

[56] See O. Ferraz (2009), above n. 44; F.F. Hoffmann and F.R.M.N Bentes, 'Accountability for Social and Economic Rights in Brazil', in Gauri and Brinks, above n. 7, at 100.

[57] See, for example, the discussion in the last chapter of Gauri and Brink, above n. 7.

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of social policy seems to have a more equitable effect and in some cases also contributes to a more participatory and inclusive policy process. However, much more empirical work is needed in this area.